13

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~491~~ 259

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

MAGLOIRE A. MOUSEAU.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

FILED OCTOBER 15, 1870.

SUPREME COURT OF THE UNITED STATES.

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UNITED STATES OF AMERICA:

The President of the United States to the justices of the supreme court of Wyoming Territory, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of Wyoming Territory before you, between Magloire A. Mouseau and The Western Union Telegraph Company, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company, as by its complaint appears; we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may leave the same at Washington on the first Monday of De-
2 cember next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this 16th day of May, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.]

J. W. HUTCHINSON,
Clerk Supreme Court Wyoming Territory.

3 CHEYENNE, *May* 16, 1870.

I hereby acknowledge receipt of a copy of the within citation by copy.

E. A. JOHNSON,
Att'y for Defendant in Error.

4 In supreme court Wyoming Territory, ss.

UNITED STATES OF AMERICA:

To Magloire A. Mousseau, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Wyoming Territory, wherein The Western Union Telegraph Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of
5 said Supreme Court of the United States, this sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy.

By J. H. HOWE,
Chief Justice of the Sup'e Ct. Wyoming Ty.

6 TERRITORY OF WYOMING,
County of Laramie, ss:

Daniel McLaughlin, being first duly sworn, deposes and says that he

made service of the within citation on E. P. Johnson, the attorney for the plaintiff within named, at Cheyenne City, in said county and Territory, on the 16th day of May, A. D. 1870, by personally delivering to him a true and certified copy of the same.

DANIEL McLAUGHLIN.

Subscribed & sworn to before me this 6th day of July, A. D. 1870.
J. W. HUTCHINSON,
Clerk Supreme Court Wyoming Territory.

(Indorsed:) In Supreme Court United States. Western Union Telegraph Company, pl'ff in error, vs. Magloire A. Mousseau, def't in error. Citation to defendant.

7 Be it remembered that heretofore, to wit, on the 22nd day of November, 1869, the appellant, The Western Union Telegraph Company, filed its certain transcript in the clerk's office of the Supreme Court of Wyoming Territory in words and figures as following, to wit:

District court, Territory of Dakota, (Wyoming,) county of Laramie, 2nd judicial district.

MAGLOIRE A. MOUSEAU
vs.
WESTERN UNION TELEGRAPH COMPANY, A corporation doing business in Dakota Territory. } Complaint.

Plaintiff says that, on the first day of May, 1867, at Horse Shoe Station, in the Territory of Dakota, he sold and delivered to the defendants 754 telegraph poles at defendants' request; that defendants agreed to pay the plaintiff for said poles $2 25 for each pole, amounting in the whole to the sum of $1,696 50.

8 And plaintiff says there is now due to him from the defendants the sum of $1,696 50, for which sum the plaintiff demands judgement against the defendants, with interest from the 1st day of May, 1867, besides the costs of this action.

J. E. PALMER,
Attorney for Plaintiff.

LARAMIE COUNTY, *ss:*

Magloire A. Mouseau, being duly sworn, says he is plaintiff in the above-entitled action; that the matters and things set forth in the foregoing complaint are true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

M. A. MOUSSEAU.

Sworn to & subscribed in my presence this 20th day of March, 1869.
W. L. KUYKENDALL,
Judge of Probate & J. P.

(Indorsed:)

LARAMIE COUNTY, *ss:*

Henry S. Pearce, being duly sworn, says he served the defendants

with a true copy of this complaint on the 20th day of March,
9 1869, by leaving a true copy thereof with J. H. Nichols personally, who was then in the office of the defendants, at the city of Cheyenne, county of Laramie, & the only acting agent of defendants there.

HENRY S. PEARCE.

Sworn to & subscribed in my presence this 22nd day of March, 1869.
J. W. HUTCHINSON, *Clerk.*

Filed April 20th, 1869.

J. W. HUTCHINSON, *Clerk.*

TERRITORY OF DAKOTA, *County of Laramie:*

District court, 2nd judicial district.

MAGLOIRE A MOUSEAU
vs.
THE WESTERN UNION TELEGRAPH COMPANY, a corporation doing business in Dakota Territory. } Summons.

To the above-named defendants:

10 You are hereby summoned and required to take notice that you are required to answer the complaint of the plaintiff in the above-entitled action, and to serve a copy of your answer on the subscriber, at his office, in the city of Cheyenne, in the county of Laramie, within thirty days after the service of this summons upon you, exclusive of the day of service, or the plaintiff will take judgment against you for the sum of $1,696 50, with interest from the 1st day of May, 1867, besides the costs of this action.

J. E. PALMER,
Attorney for the Plaintiff.

Dated Cheyenne, March 20th, 1869.

(Indorsed:)

LARAMIE COUNTY, *ss:*

Henry S. Pearce, being duly sworn, says he served the within summons on the defendants by leaving a true copy of the summons with J. H. Nichols, who was then in the office of the defendants, in the city of Cheyenne, Laramie County, to wit, on the 20th day of March, 1869, said Nichols being the clerk & managing agent of the defendants,
11 who said no other person represented the defendants in said city of Cheyenne.

HENRY S. PEARCE.

Sworn to & subscribed in my presence this 22nd day of March, 1869.
J. W. HUTCHINSON, *Clerk.*

Filed April 20th, 1869.

J. W. HUTCHINSON, *Clerk.*

THE TERRITORY OF WYOMING, *Laramie County, ss:*

District court, 2nd judicial district.

MAGLOIRE A. MOUSEAU
vs.
WESTERN UNION TELEGRAPH COMPANY. } Motion.

And now comes the defendant for the special purpose of making this motion and for none other, and moves the court to quash the summons and complaint in said action, and dismiss the said action, for the
12 following good and sufficient reasons in law, namely:

1st. The action is pending in the Territory of Wyoming, and was brought after said Territory was created by act of Congress.

2nd. The summons is defective and invalid in this, that is issued in Dakota Territory, and has no force and vitality in Wyoming Territory, where it was served.

Western Union Telegraph Company,
By W. B. HIBBARD, *Superintendent.*

Filed April 20th, 1869.

J. W. HUTCHINSON, *Clerk.*

MAGLOIRE A. MOUSEAU
vs.
WESTERN UNION TELEGRAPH COMPANY. } Judgment.

The summons and a copy of the complaint herein having been
13 personally served on J. H. Nichols, managing agent for the def'ts, more than 30 days before this date, and no answer having been served on pl'ff's att'y, now, on motion of J. E. Palmer, pl'ff's att'y, it is adjudged that the plaintiff, Magloire A. Mouseau, do recover of the def'ts, The Western Union Telegraph Company, the sum of nineteen hundred & twenty-nine $\frac{79}{100}$ dollars, & costs of suit taxed at $21 05.

J. W. HUTCHINSON, *Clerk.*

APRIL 20TH, 1869.

TERRITORY OF DAKOTA, *County of Laramie:*

Dist. court, 2nd judicial dist.

MAGLOIRE A. MOUSSEAU, PL'FF,
vs.
WESTERN UNION TELEGRAPH COMPANY, DEFENDANT. } Notice.

To the above-named plaintiff and J. E. Palmer, his attorney:

Take notice that I will, on the first day of the next term of said district court, or so soon thereafter as the same can be heard, call
14 up the accompanying motion for argument and the judgment of the court thereon.

DANIEL McLAUGHLIN,
Att'y for Defendant.

TERRITORY OF DAKOTA, *County of Laramie:*

Dist. court, 2nd judicial dist.

MAGLOIRE A. MOUSSEAU, PL'FF,
vs.
WESTERN UNION TELEGRAPH COMPANY, DEF'T. } Motion.

Now comes the defendant above named, and moves the court, on the answer, the affidavits of Martin Hogan, J. H. Nichols, W. B. Hibbard, the "motion to quash," letter of J. E. Palmer, att'y for plaintiff, and all the pleadings, papers, and proceedings in the above entitled cause, to set aside the judgment entered by the clerk in this cause, and open the default and permit the defendant to interpose its defence to plaintiff's claim, for the following reasons, to wit:

15 1st. Because the judgment is irregular, and was obtained by falsehood and fraud.

2nd. Because no default had occurred.

3rd. Because the clerk is not a judicial officer, and is not authorized and empowered to perform judicial acts.

4th. Because the defendant has a good and substantial defence to interpose on the merits of this cause.

DANIEL McLAUGHLIN,
Att'y for Defendant.

(Indorsed:)

I certify that I served a true copy of the within motion & notice personally on J. E. Palmer, att'y for plaintiff, this 5th day of May, 1869.

N. J. O'BRIEN,
Coroner & Acting Sh'ff Laramie County.

Filed May 5th, 1869.

J. W. HUTCHINSON, *Clerk.*

16 May term, 1869, Wednesday, May 26th, 1869.

MAGLOIRE A. MOUSEAU
vs.
WESTERN UNION TELEGRAPH CO. } No. 303.

Now come the defendants by D. McLaughlin, and move the court to set aside the judgment entered by the clerk herein.

Ordered by the court that the judgement be set aside upon condition of the payment by the defendants of the costs that have accrued up to this time.

Further ordered that the defendants answer by to-morrow morning.

J. H. HOWE, *Judge*, &c.

In the district court of the second judicial district of Dakota Territory in and for the county of Laramie.

MAGLOIRE A. MOUSEAU, PL'FF,
against
WESTERN UNION TELEGRAPH COMPANY, DEfendant. } Answer.

17 Defendant, for answer to the complaint of plaintiff herein, denies that, on the first day of May, 1867, or at any other time, it pur-

chased of plaintiff 754 telegraph poles, or any number of poles; denies that it is indebted to plaintiff in the sum of $1,696 50, or in any sum whatever.

Wherefore defendant prays judgment for its costs in this behalf expended.

DANIEL McLAUGHLIN,
Att'y for Defendant.

STATE OF NEBRASKA, *County of Douglas:*

W. B. Hibbard, being first duly sworn, deposes and says that he is the general superintendent and agent of the defendant, who is a corporation; that he has read the foregoing answer, knows the contents thereof, and knows the same to be true of his own knowledge.

W. B. HIBBARD.

Subscribed and sworn to before me this 27th day of April, A. D. 1869.
[NOTARIAL SEAL.] W. H. S. HUGHES,
Notary Public.

18 (Indorsed:)

I certify that I served a true copy of the within answer personally on J. E. Palmer, att'y for plaintiff, this 5th day of May, 1869.

N. J. O'BRIEN,
Coroner & Acting Sh'ff Laramie County.

Filed May 27th, 1869.

J. W. HUTCHINSON, *Clerk.*

September term, 1869, Wednesday, Sept. 29th, 1869.

MAGLOIRE A. MOUSEAU
vs.
WESTERN UNION TELEGRAPH CO.

This cause coming on for trial, the following jury was empannelled and sworn, to wit: 1, A. G. Mead; 2, W. F. Corbert; 3, W. Willard; 4, C. W. Norwood; 5, J. T. Chaffin; 6, R. M. McMurray; 7, Charles Beno; 8, John Durbin; 9, C. S. Snow; 10, T. E. Lacey; 11, D. B. Curtis; 12, A. R. Converse.

19 The foregoing witnesses were sworn, and testified, to wit, M. A. Mouseau, Ja's Martin, J. H. Nichols; & the depositions of W. B. Hibbard & Martin Hogan were read to the jury.

The jury, having retired and considered the case, return and bring in their verdict for the pl'ff for $1,983 48.

J. H. HOWE,
Judge, &c.

M. A. MOUSEAU
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

We, the jury in the above-entitled action, find for the pl'ff, and assess the damages at $1,983 48 *dollars.*

J. T. CHAFFIN, *Foreman.*

SEPT. 29, '69.

Filed Sept. 29th, '69.

J. W. HUTCHINSON, *Clerk.*

TERRITORY OF WYOMING, *County of Laramie:*

20 In dist. court, first judicial dist.

MAGLOIRE A. MOUSEAU, PL'FF,
vs.
WESTERN UNION TELEGRAPH COMPANY, DEF'T.

Now comes the defendant above named, and moves the court, by McLaughlin, its attorney, that the verdict of the jury rendered on the trial of said cause in said court on the 29th day of September, 1869, be set aside, and a new trial ordered, for the reasons following, to wit:

1st. Because the complaint does not state facts sufficient to constitute a cause of action.

2nd. Because the evidence in the case was insufficient to sustain the verdict.

DANIEL McLAUGHLIN,
Att'y for Def't.

(Indorsed:)

21 To Magloire A. Mouseau, and to Palmer & Johnson, his att'ys:

Take notice that, on the 7th day of October, 1869, I will call up the foregoing motion for the judgment of the court thereon.

DANIEL McLAUGHLIN,
Att'y for Def't.

Service of a certified copy of the within motion and notice on us this day of October, 1869, acknowledged.

PALMER & JOHNSON,
Att'ys for Pl'ff.

Filed Oct. 4th, 1869.

J. W. HUTCHINSON, *Clerk.*

September term, 1869, Wednesday, Oct. 6th, 1869.

M. A. MOUSEAU
vs.
WESTERN UNION TELEGRAPH CO.

Now comes the defendant by D. McLaughlin, its attorney, and moves for a new trial herein. Motion overruled by the court. Def't, by
22 its attorney, excepts. Judgment is rendered by the court for the pl'ff for $1,983 48, & costs, taxed at $191 19.

J. H. HOWE,
Judge, &c.

TERRITORY OF WYOMING, *County of Laramie:*

In the dist. court, first judicial district.

MAGLOIRE A. MOUSEAU, PL'FF,
vs.
WESTERN UNION TELEGRAPH COMPANY, DEFENDANT.

To the above-named plaintiff, Palmer & Johnson, his attorneys, and the clerk of said court:

Take notice that the defendant above named appeals from the order

of the district court refusing a new trial, made and entered in said cause on the day of October, 1869, and from the judgment of said court entered at the same time in favor of the plaintiff and
23 against said defendant for the sum of $1,983 50, to the supreme court of Wyoming Territory.

DANIEL McLAUGHLIN,
Att'y for Defendant.

OCT. 25TH, 1869.

(Indorsed:)
Service of a copy of the within notice of appeal on us this day acknowledged.
Oct. 25th, 1869.

PALMER & JOHNSON,
Att'ys for Pl'ff.
J. W. HUTCHINSON,
Clerk District Court.

TERRITORY OF WYOMING,
1st Judicial District, County of Laramie, ss:

I J. W. Hutchinson, clerk of the district court within and for the first judicial district of said territory, do hereby certify that the within and foregoing is a true and correct transcript of the summons, the pleadings, the judgment, verdict, and all orders or papers in any way involving the merits and necessarily affecting the judgment in the above-entitled cause.

24 In witness whereof I have hereunto set my hand and affixed the seal of said court this 22nd day of November, A. D. 1869.

{ FIRST DISTRICT } J. W. HUTCHINSON,
{ COURT SEAL. } *Clerk District Court 1st Dist. of Wyoming.*

(Endorsed:) Filed Nov. 22nd, 1869.

J. W. HUTCHINSON,
Clerk Supreme Court.

And afterwards, to wit, on the 3rd day of May, 1870, the appellant, by its attorney, D. McLaughlin, filed its certain bill of exceptions in words and figures as follows, to wit:

TERRITORY OF WYOMING, *County of Laramie, ss:*

In dist. court, first judicial dist.

MAGLOIRE A. MOUSEAU
vs.
WESTERN UNION TELEGRAPH COMPANY,
defendant.

25 Be it remembered that, on the 6th day of October, 1869, on the hearing of the motion heretofore made by the defendant for a new trial for the reasons stated in said motion, the court overruled said motion, to which ruling of the court the defendant, by its attorney, Daniel McLaughlin, then and there excepted, and now asks of this court to put its hand to its bill of exceptions, which is accordingly done.

J. H. HOWE, *Judge, &c.*

(Endorsed:) Filed May 3rd, 1870.

J. W. HUTCHINSON,
Clerk Supreme Court.

And on the same day, to wit, on the 3rd day of May, 1870, the testimony in the foregoing cause was filed in words and figures as follows, to wit:

TERRITORY OF WYOMING, *County of Laramie, ss:*

In supreme court.

MAGLOIRE A. MOUSEAU, PL'FF,
vs.
26 WESTERN UNION TELEGRAPH COMPANY,
defendant.

The issues in said action came on for trial before Honorable J. H. Howe, chief justice of the supreme court and judge of the first judicial district of Wyoming Territory, at a term of said district court begun and holden at the city of Cheyenne, Laramie County, on the 29th day of September, 1869.

A jury was called and sworn, and the plaintiff by his counsel opened the case.

MAGLOIRE A. MOUSSEAU, the plaintiff, being the first witness called, and being duly sworn, testified substantially as follows, to wit:

I reside at Fort Laramie. About the 10th of October, 1866, Martin Hogan told me that the company wanted me to get out poles; I said I would let him know. About the 15th or 16th he came again, when I told him I would get them during the winter. He urged me to get
27 four or five thousand—all I could get out; asked me to put them in enclosure of the company, and put in piles of a hundred each. Hogan also asked me to get some poles for South Pass about the first of May. I told him I would not go there, as I did not want to loose what I had; he said the company wanted me to get all the poles they could. I saw his notices of construction, signed Martin Hogan.

(Def't's counsel objected to his stating by whom signed and how, as the notices were the best evidence of how and by whom signed. Objection sustained by the court.)

He also, about the 10th of January, ordered Alf. Shaw to have every load of poles examined, and to go with me before they were unloaded. After I had a few loads, he told Shaw, the operator, to receive them. Shaw came and told me that one was broken and helped me put it up. Hogan told me to get out as many as he should need, and he would take them. Said he would mark them himself. I delivered 757 after Hogan counted them. Harper and me counted them altogether. We made out 753, and the one used, 754. Hogan came and asked me,
28 "How many?" I told him 757. He said he made out but 754. I said they were all right. He said they were the best lot of poles he had received.

Hogan counted and marked them. I demanded pay. Hogan said he would pay shortly. The price was to be $2¼ per pole. Martin Hogan was the only known superintendent. He had bought from others; was buying poles, hay, &c., on part of the company. In April (12th) Hogan paid me for mules, horses, and hay. There was a notice at Horse Shoe, written, signed by Martin Hogan.

(Objected to by def't's counsel. Objection sustained by the court, on the ground that the notice itself should be produced.)

Hogan had control over the operator at Horse Shoe in the fall; and also the operator at Dale Bridge Station was controlled by him, and discharged by him, and paid by him. One of them afterwards worked for me. Hogan made no objection to the poles. I had three conversations with him in regard to pay. He told me to go to Mr. Hibbard, who always put me off.

29

On cross-examination he testified substantially as follows:

Hogan said the company wanted to repair the line with the poles. He said rebuild or repair. I don't know if the Indians were very bad. The company said there were parties *were* being killed in the summer of '67. Don't know if company's men were driven off. The driving off was twelve miles away, at Elkhorn Springs. No man was killed or wounded. Hogan said several times at my house, and would pull out papers to show his authority to get poles and rebuild. That was all the knowledge I had of his authority, and what I saw him do. He said, "I am authorized to get all I can, and you will receive your pay when they are accepted." My contract was in the fall of '66, October. The stipulated price was $2¼ each at Horse Shoe. I asked them (meaning Hibbard & Creighton) three or four times for my pay, through Hogan, who telegraphed in my presence, and they always put me off. I did not enquire of the superintendent at Omaha as to Hogan's authority. I presented my bill to Hogan. My claim is for my transaction with Hogan, and with no other party.

30

JAMES MARTIN was next called as a witness for the plaintiff, and, being duly sworn, testified substantially as follows, to wit:

I reside at Denver; resided in the fall of '66 and spring of '67 at Denver, but was at Caspar; was with Hogan in spring of '67, at Laramie and Casper; was with Mousseaux when he delivered the poles at Horse Shoe, 753 in number; was present when Hogan took possession of and counted the poles, and also marked them. There was some conversation in regard to payment. Hogan said he would have to draw money from the company before he could pay for the poles. He expected to do so in a short time. I went to Caspar with Hogan, and had some conversation with him. He said he expected to pay for the poles of Mousseau. Hogan was considered the sup't of repairs. He made contracts for the company, and paid for them. He had charge of company's property, and purchased material. He was known as the person in charge. Saw notices posted. Hogan posted up notices, and signed as sup't.

31

(Objected to on same ground as before. Objections sustained by court.)

The company took one pole near Horse Shoe, and put it into the line; have seen it since. After we got to Caspar, Mr. Hogan asked me to bid for distributing them along the line. He said he would consult Hibbard. He received an answer that he would not pay me my price. About ten days afterwards Hogan said he was authorized to accept my offer. I had disposed of my transportation then. Telegrams were sent in my presence by Hogan, or sent to him.

On cross-examination he testified substantially as follows:

A pole was taken out of the pile in '67, after the delivery at Horse Shoe; don't know the month, but think it was early in April. Operator

at Horse Shoe took it. Mousseau was present. It was put up
32 about 100 yards from the pile. I was present when the pole was taken and put in the ground; never saw any others taken out.

I know of Hogan's purchasing lime, &c., for the office at Caspar on short credits. I think, as soon as he drew money from the company, Hogan was in the habit of paying for material. Bills were made and forwarded to the company, he said. I knew he bought lime for telegraph company's office. He bought poles of Laramer, and also of Ecoffey, and did not pay cash for them. I was present when the bargains were made between Laramer and Hogan, and when Hogan counted them—the poles. He did not pay for them then; don't know if they are paid for.

Here the plaintiff rested.

The defendant then introduced and read in evidence the deposition of W. B. HIBBARD, taken by agreement before M. A. Arnold, notary public in and for Laramie County and Territory of Wyoming, on the
32a 25th day of September, 1869:

1st ques. State your name, age, and occupation, and place of residence.

1st ans. W. B. Hibbard; 33 years; occupation, sup't of Western Union Telegraph Co.; residence, Omaha, Neb.

2 ques. Are you acquainted with all of the western business of said company between the Missouri River and Salt Lake?

2 ans. I am.

3 ques. State if the company had any authorized agent in the vicinity of *of* Fort Laramie in the years of 1866 and 1867.

3 ans. They had none.

4 ques. State who had charge of repairs on the line of the telegraph in the fall of 1866 and spring of 1867.

32b 4 ans. Martin Hogan had charge of repairs in the vicinity of Fort Laramie, and from there to South Pass.

5 ques. State what authority he had to act for the company at that time.

5 ans. He was employed to keep the line in repair and in good working condition, and was furnished with funds necessary for that purpose.

6 ques. Had he any authority, while so employed, to contract debts for the company? and, if so, state for what purpose, and to what extent.

6 ans. His duties would have made it proper for him to contract such debts as would have been necessary to keep the line in repair and actual operation during that time.

7 ques. Had he authority to purchase hundreds of telegraph
33 poles by contract at that time? and, if not, state by whom large numbers of poles were purchased for the company.

7 ans. He was not authorized to purchase any telegraph poles, except for immediate use in cases where the former poles had been broken down or destroyed in such a manner as to prevent the operation of the telegraph, and when the necessity of the case prevented him from communicating with the superintendent.

8 ques. State whether Hogan had contracted debts in the name of the company, as its agent, while acting as foreman of repairs, that were recognized afterwards, and paid by the company for telegraph poles.

8 ans. No, sir.

9 ques. State whether the plaintiff ever presented any claim for those poles prior to the commencement of this suit?

9 ans. He did not

Cross-examined:

34 1 ques. How long have you occupied your present position as sup't of the company?

1 ans. Since first of February, 1867.

2 ques. Do you know what instructions Hogan was acting under at the time he purchased these poles?

2 ans. I do not know that he purchased any poles.

3 ques. Were you the superintendent of the company at that time?

3 ans. I was ass't sup't, also cashier and secretary for the lines between Omaha and Salt Lake during the whole of 1866 and up to February, 1867.

4 ques. Did you have charge of this man Hogan?

4 ans. I did have charge of Hogan at that time, under the sup't of the line.

5 ques. From whom did he receive his instructions at that time?

5 ans. From the superintendent of the company, and also from myself.

35 6 ques. State whether the company at that time were not buying poles to extend their lines.

6 ans. They were not buying poles to extend their lines at that time; but the superintendent had agreed for or purchased poles for the purpose of rebuilding a section of the line. E. Creighton, the superintendent, had purchased the poles for rebuilding a good portion of the telegraph line between Julesburg and South Pass, via *of* Fort Laramie.

7 ques. Did he purchase the poles personally?

7 ans. I believe he did, either by word of mouth or by letter, or by telegraph dispatch.

8 ques. Do you know, of your own knowledge, that Mr. Hogan was never authorized to purchase any of these poles?

8 ans. I do not.

9 ques. Anything else not already testified to?

9 ans. The company were proposing to rebuild the greater portion of their telegraph line between Julesburg and Salt Lake City, on ac-

36 count of the defective condition of some old poles; and I know that Mr. Creighton had arranged with different parties along the route for poles. The line was not rebuilt, as had been intended, upon this route, on account of Indian hostility driving us from the road, but a line built via Denver and Bridger's Pass to Salt Lake City.

W. B. HIBBARD.

The defendant then introduced J. H. NICHOLS as a witness, who, being duly sworn, testified substantially as follows:

I reside at Cheyenne, and am agent of The Western Union Telegraph Company, and acquainted with its rules. The rule is, that no one but the sup't has authority to purchase without a written authority from the sup't. M. E. Creighton was the sup't in 1866; Mr. Hibbard, in '67. A superintendent of repairs is not authorized to contract without authority.

Cross-examined:

I came here in Nov., 1867. At that time this line was used

37 only to Fort Laramie. Knew Hogan as sup't of repairs. The rules have been the same for the last seven or eight years. Have been connected with the company for that time. Every employee of the company knew the rules; they are published in printed books; are not posted up, but are not distributed so the public can know them.

MOUSSEAU recalled:

I sold five tons of hay, at $50 00 per ton, to the company. I knew nothing of the rules but from Hogan. Never saw or heard of books of rules.

The defendant next introduced and read the deposition of MARTIN HOGAN, taken by agreement before W. L. Kuykendall, judge of probate and ex-officio justice of the peace in and for Laramie county, Wyoming Territory, on the 27th day of Sept., 1869:

1st ques. State your name, age, occupation, and place of residence.

1st ans. My name is Martin Hogan. I am thirty-three years
38 of age. I am a telegraph operator for the U. P. R. R. Company; and my place of residence is at Archer Station, Wyoming Territory.

2 ques. Do you know the parties to this suit?

2 ans. I do.

3 ques. State where you were during the fall and winter of 1866, and the spring and summer of 1867; and in what were you engaged at that time.

3 ans. In the fall and winter of 1866 I was between Fort Laramie and Green River. In 1867 I was between Fort Laramie and South Pass, acting as foreman of repairs on the Western Union Telegraph line.

4 ques. State whether you had any authority from the defendant to act as its agent in the purchase of material to repair that line? and, if so, state fully the character and nature of that authority, and its extent.

4 ans. I had no authority as agent, to my knowledge; but I
39 purchased poles by first asking permission, by letter or telegraph, from E. Creighton, superintendent, and from W. B. Hibbard, ass't sup't—this in 1866—for the purpose of repairing the line. The rules of the company were to pay cash for material to repair telegraph line. If there was any other rule I did not know it.

5 ques. State how you made your purchases of material, as foreman of repairs on that line, in the spring of 1867; whether for cash or on credit; and, if the former, by whom it was furnished to you.

5 ans. I paid cash for everything I purchased for repairs of line in 1867, and took receipts for everything I purchased. The cash was furnished me by W. B. Hibbard in 1867. I got money from individuals often, and gave them orders on Hibbard.

6th ques. State all you know in relation to the plaintiff, Magloire A. Mousseau, on the 1st day of May, 1867, or at any time previous, while you were foreman of repairs, selling and delivering to the de-
40 fendant seven hundred and fifty-four telegraph poles, or any other number of poles; who purchased the same for defendant; by whose authority they were purchased; the terms and condition of the sale, if any were made; and all the pertinent facts relating to the same now within your knowledge.

6th ans. I spoke to Mr. Mousseau in the fall of 1866—or he spoke to me—about getting out poles. I believe I told him to get out a certain number of poles, (do not remember now how many,) as he had nothing else to do for his men; and I thought we would need them for the use of the line. He got out the number of poles, seven hundred and some odd. I counted the poles, and my memory is bad as to what I told Mr. Mousseau, but think I told Mr. Mousseau that if we needed the poles we would take them. At that time, in the spring of 1867, I thought we

would need them. I notified Mr. Hibbard of Mr. Mousseau's poles, and asked permission to buy the poles. I received no answer or per-
41 mission to buy them, to my knowledge.

7 ques. State whether you bought those poles for the defendant.

7 ans. I did not buy them, and could not without permission. If I had authority to buy material without permission, I did not know it.

8 ques. State if you had contracted with Mousseau for these poles for the defendant, you would not have paid for the same at or about the time of counting the poles; and whether it was not the rule of the defendant to furnish you with money, or make provisions so you could get it, to pay for all material purchased by you.

(Objected to by plaintiff on the ground of being hypothetical and leading.)

8th ans. If I had made a written contract with Mousseau I should have paid him when the poles were counted, as the rule of the company was to pay all written contracts. I would not have made a written contract without permission, unless the state of the line actually needed material for immediate use. In the latter case I would have
42 taken it upon myself to make such a contract, and run the chance of getting permission afterward.

9th ques. State the reasons, if there were any, why you told the plaintiff that you thought the defendant would need those poles; and give the reasons, if any there are, why the defendant did not need them, as you anticipated. I here refer to the conversation referred to in your answer to the sixth question, in the spring of 1867.

9 ans. My reasons were that I had instructions from the superintendent of the company to put the line in good order between Fort Laramie and Green River, in 1866, and between Fort Laramie and South Pass, in 1867. I repaired the line west of Fort Laramie about fifty miles, when Indians drove the men from their work various times. I tried to get protection from the military for the line builders, but could not get sufficient force to insure the men protection from the Indians, and therefore had to abandon repairs on the line, as I could not
43 get men to work it in consequence of the great danger.

10 ques. State any other matter or thing you know of that is material to the defence in this action as fully as though you had been interrogated regarding the same.

10 ans. I do not know of any other matter.

Cross-examined:

1st ques. Who was the superintendent at Horse Shoe, at the time the poles referred to were delivered?

1st ans. At the time the poles were left at Horse Shoe, Hibbard was the superintendent, and was in Omaha. There was no superintendant at Horse Shoe.

2nd ques. Have you any reccollection of putting up notices at offices on the line at Horse Shoe, signed as agent for the line?

2 ans. I do not remember of putting up notices signed as agent of the line. I have not signed such notices as agent.

44 3 ques. If such notices were put up at Horse Shoe Station, would you not have been likely to have seen it?

3 ans. I would have been likely to have seen them; and if they were signed as agent by me, it was on my own responsibility, as I had no permission to sign as agent.

4 ques. Were you not generally known as having authority to pur-

chase poles and other material along the line at and near Horse Shoe Station for def't?

4 ans. I do not know, but suppose I was from the way the people all talked.

5 ques. Did you ever tell any person in that vicinity that you did not have authority to purchase poles for def't?

5 ans. Not to my knowledge, either way.

6 ques. Did you ever purchase poles from any one for defendant?

6 ans. I did not, except by permission from the superintendent.

7 ques. Did you ever purchase poles before you received per-
45 mission from the superintendent?

7 ans. Never, except in extreme cases, when I could not communicate with the superintendent.

8 ques. Did the defendant ratify those purchases afterwards, and pay for the same?

8 ans. Yes; the defendant did.

9 ques. Did you ever disclose to the plaintiff or others in that vicinity the restrictions upon your authority to purchase poles?

9 ans. I think I did to plaintiff, but am not positive. I think I remember of doing so; and I think I *I* don't; but I am rather of the opinion I did. My memory is very poor.

10 ques. Why is it that, in your affidavit, from which you have refreshed your memory here, *that* you say you were superintendent, and now that you were foreman?

10 ans. Sup't of repairs and foreman of repairs are the same thing, according to my understanding of the matter.

46 11 ques. State what you said at the time the poles were counted, and also what the plaintiff, Mousseau, said.

11 ans. I do not remember anything further than what I have before stated. I marked the poles as I counted them, so that I would not make a mistake in counting them, and also marked the number in each pile.

12 ques. Were you in the habit of marking poles for individuals?

12 ans. I was in the habit of marking poles for individuals without receiving them, for my own satisfaction.

13 ques. Who was present at the time of marking Mousseau's poles besides Mousseau?

13 ans. I do not remember of any one being present, except Mr. Mousseau; do not remember that James Martin was present, but think he was at the station.

14 ques. Did Mousseau at that time ask you for pay for the poles; if so, what did you say to him?

47 I told him that when we needed the poles, we would pay for them; that we would probably want them that summer.

15 ques. Did you not tell Mr. Mousseau, at the time of the counting of the poles, and in reply to his demand for his pay, that you had no money now, but will send to the company for it, and pay you soon for these poles?

15 ans. I do not remember making such reply, or anything more than I have stated before.

16 ques. Have you recently, in a conversation with the plaintiff, told him that the company ought to have paid him for his poles long ago?

16 ans. In a conversation with the plaintiff recently I did make such a remark, but not as an agent of the defendant.

17 ques. Do you remember a conversation had with James Martin, after the counting of the poles, in relation to paying Mousseau the money due on these poles?

17 ans. I remember a conversation in relation to the poles, but
48 do not remember what it was.

18 ques. Do you remember sending a telegram to Mr. Martin in relation to the poles in dispute?

18 ans. I do not remember sending a telegram to Martin in relation to the poles, or about distributing the poles along the line; know I never sent such a telegram.

19 ques. Did you ever have any conversation with Mr. Martin, or any one else, after counting the poles referred to, or about the distributing of them.

19 ans. I do not remember having any conversation with Mr. Martin or any one else as to the distribution of the poles.

20 ques. Did you ever purchase any hay for the defendant from plaintiff or others that you did not pay for at the time the hay was delivered?

20 ans. I did buy hay from plaintiff, for which I paid him a short
49 time after the agreement—probably a week or two weeks afterwards—by permission of the superintendent.

21 ques. Did you ever purchase any telegraph poles for the defendant on that line that you did not pay for when you approved of the poles and place of delivery, and accepted them?

21 ans. I did not, that I remember of.

22 ques. Did you not purchase poles from Mr. Lee or Jules Ecoffey that you did not pay for at the time of delivery, and not for some time after?

22 ans. I paid Mr. Lee for his poles at the time of delivery. I did not purchase Ecoffey's poles. I counted and accepted them for the superintendent by his order. I understood that Ecoffey received his pay.

23 ques. At the time Mousseau demanded pay for his poles, did you have any funds in your possession belonging to defendant?

23 ans. I had funds; I did not properly understand about the funds at the time I made the affidavit.

50 24 ques. Why did you tell Mousseau, at the time you counted those poles, that you had no funds?

24 ans. I don't know that I told him I had no funds. I did not purchase the poles. Even if I had told that I had no funds, I did not think it was any of his business to ask me the question, as I did not purchase or receive them.

25 ques. At the time you had the first conversation with plaintiff about the poles, did you tell him the kind of poles you wanted?

25 ans. I did.

26 ques. Was there any objection to those poles, about their being of the kind that you were not in the habit of buying?

26 ans. There was no objection to the poles. They were good, sound poles.

Re-direct:

Ques. Have you any interest in the event of this suit.

51 Ans. None whatever.

M. HOGAN.

The above and foregoing is substantially the evidence adduced before the jury and court upon the trial of the foregoing entitled cause.

April 30, 1870.

E. P. JOHNSON, *Att'y for Pl'ff.*
DANIEL McLAUGHLIN, *Att'y for Def't.*

(Endorsed:) Filed May 3rd, 1870.

J. W. HUTCHINSON,
Clerk Supreme Court.

And on the same day, to wit, on the 3rd day of May, 1870, the appellant by its attorney, D. McLaughlin, filed its certain assignment of errors in words and figures as follows, to wit:

In the supreme court of Wyoming Territory.

52 WESTERN UNION TELEGRAPH COMPANY, appellant, vs. MAGLOIRE A. MOUSSEAU, RESPONDENT. } Assignment of errors.

At a general term of said supreme court, held at Cheyenne City, in Laramie County, in said Territory, on the second day of May, 1870—present, J. H. Howe, chief justice; J. W. Kingman and W. T. Jones, associate justices—comes the appellant above named by Daniel McLaughlin, its attorney, and says that in the pleadings, record, and proceedings, and also in giving the judgment in the case of Magloire A. Mousseau vs. Western Union Telegraph Company, in the district court of the first judicial district of said Wyoming Territory in and for Laramie County, there are manifest errors in this, to wit:

1. The court erred in not sustaining the motion to quash the summons and complaint for the reasons therein stated in said motion, and filed April 19, 1869.

53 2. The court erred in denying the motion of the defendant, filed October 4, 1869, to set aside the verdict of the jury in said cause for the reasons set forth in said motion, and in rendering judgment thereon against the said defendant.

Wherefor the said Western Union Telegraph Company pray that the judgment so rendered as aforesaid, and as more fully appears by the record, for the errors aforesaid may be reversed and held for naught; and that it may be restored to all things which it has lost by occasion of said judgment.

DANIEL McLAUGHLIN,
Att'y for Appellant.

(Endorsed:) Filed May 3rd, 1870.

J. W. HUTCHINSON,
Clerk Supreme Court.

And on the same day, to wit, on the 3rd day of May, 1870, the following proceedings were had in the supreme court of the Territory of Wyoming, to wit:

54 MAGLOIRE A. MOUSSEAU, RESP., vs. WESTERN UNION TELEGRAPH CO., APP. } No. 1.

Now comes the said appellant by its attorney, and presents to the court its assignment of errors in the trial of this cause in the court below, & argues its cause to the court.

And afterwards, to wit, on the 5th day of May, 1870, at a term of the

supreme court for the Territory of Wyoming, the following proceedings were had, to wit:

Thursday, May 5th, 1870.

MAGLOIRE A. MOUSSEAU
vs.
WESTERN UNION TELEGRAPH COMPANY.

This day came the parties by their attorneys, & the cause having been fully presented to and understood by the court, and mature
55 deliberation being thereupon had, it appears to the court here that there is no error either in the record and proceedings or in the giving of judgment by the court below: Therefore it is considered that the judgment aforesaid be in all things affirmed, and stand in full force and effect. And it is ordered that a writ of procedendo be issued to the district court of the first judicial district to enforce the judgment therein; and it is further considered that the said M. A. Mousseau do recover of the said Western Union Telegraph Company his costs in this behalf expended, taxed to $6 00.

And afterwards, to wit, on the 6th day of May, 1870, the opinion of said court was filed in words and figures as follows, to wit:

Supreme court Wyoming Territory, May term, A. D. 1870.

MOUSSEAU
vs.
WESTERN UNION TELEGRAPH CO.

56 KINGMAN, Justice:

This case comes up on error from the first judicial district. The exception taken in the court below was to the ruling of the judge, refusing to set aside the verdict on the ground that there was not sufficient evidence to sustain a verdict for the plaintiff. The law, as given to the jury, is not objected to by counsel for defendant, and this court does not differ with counsel as to the law, as now contended for by him. The only question here is, Did the jury find their verdict without evidence, or against the evidence, so that it cannot be sustained? The rule of law in this case is well settled. If there is reason to suppose that the jury have mistaken or misunderstood the evidence, or that they have been carried away by passion or prejudice, and thereby have done evident injustice to either party, it is the duty of the court to set aside their verdict and grant a new trial. But if there is evidence proper to be submitted to a jury on the issue before them, it is their prov-
57 ince to weigh it; and it must be a very clear case, appealing very strongly to the conscience of the court, to induce or permit us to interfere with their decision. It is not sufficient that another jury might probably arrive at a different conclusion, nor that the court should be entirely satisfied with the verdict. If there is evidence proper for them to consider, & tending to prove the issue presented, we must be satisfied with their judgment, unless it is made to appear that their judgment has been unfairly exercised.

In the case before us there is material and pertinent evidence tending to prove the issue on the part of the plaintiff. This is met and contradicted by evidence on the part of the defendant; but we cannot say

that it is fully overcome, or that injustice has been done by the said verdict.

The ruling of the court below is sustained, the motion for a new trial overruled, and the judgment affirmed.

58 (Endorsed:) Filed May 6th, 1870.

J. W. HUTCHINSON,
Clerk S. C.

And afterwards, to wit, on the 10th day of May, 1870, the appellant, by its attorney, D. McLaughlin, filed its certain notice of application for writ of error in words and figures as follows, to wit:

In supreme court Wyoming Territory.

MAGLOIRE A. MOUSSEAU, PLAINTIFF,
against
WESTERN UNION TELEGRAPH COMPANY, DEFENDANT.

To the above-named plaintiff, and E. P. Johnson, his attorney:

Take notice that the defendant above named will apply on Monday, the 4th day of June, 1870, to the proper authority for a writ of
59 error from the Supreme Court of the United States to the supreme court of the Territory of Wyoming to review and reverse the errors of law in the pleadings, proceedings, and record of the above-entitled cause, and to reverse the judgment heretofore entered in said cause.

DANIEL McLAUGHLIN,
Att'y for Defendant.

MAY 10, 1870.

(Endorsed:)

CHEYENNE, W. T.

Service of the within notice, by certified copy of same, accepted this 10th day of May, 1870.

E. P. JOHNSON,
Attorney for Plaintiff.

(Endorsed:) Filed May 10th, 1870.

J. W. HUTCHINSON,
Clerk S. C.

60 And afterwards, to wit, on the 17th day of May, 1870, the appellant in the foregoing cause, by its attorney, Daniel McLaughlin, filed its certain bond to def't in error in words and figures as following, to wit:

IN SUPREME COURT, *Wyoming Territory, ss*:

Know all men by these presents that we, Western Union Telegraph Company, as principal, and H. J. Rogers, banker, and C. D. Sherman, banker, at Cheyenne City, of Laramie County, Wyoming Territory, are held and firmly bound unto Magloire A. Mousseau in the sum of four thousand dollars, to be paid to the said Magloire A. Mousseau, his executors or administrators; to which payment, well and truly to be made, we

bind ourselves, our heirs, and assigns firmly by these presents,
61 sealed with our seals, and dated this 17th day of May 1870.

Whereas the above-named Western Union Telegraph Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of Wyoming Territory in the cause therein tried, when the said Magloire A. Mousseau was plaintiff, and the said Western Union Telegraph Company was defendant:

Now, therefore, the condition of this obligation is such, that if the above-named Western Union Telegraph Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Western Union Telegraph Co.,
Per DANIEL McLAUGHLIN, [SEAL.]
Its Attorney.

62 H. J. ROGERS. [SEAL.]
C. D. SHERMAN. [SEAL.]

Sealed and delivered in presence of—
DANIEL McLAUGHLIN.

(Endorsed:)
The above and foregoing bond is approved.
Cheyenne, May 17, 1870.

J. H. HOWE,
Judge, &c., and Chief Justice Wyoming Ty.

(Endorsed:) Filed May 17th, 1870.

J. W. HUTCHINSON,
Clerk S. C.

TERRITORY OF WYOMING, *Laramie County, ss:*

I, J. W. Hutchinson, clerk of the supreme court of Wyoming
63 Territory, do hereby certify that the within and foregoing is a true and correct transcript of the entire proceedings, and all orders or papers in any way involving the merits and necessarily affecting the judgment in the case of Magloire A. Mousseau vs. The Western Union Telegraph Company, now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Cheyenne, this 19th day of May, A. D. 1870.

[SEAL.] J. W. HUTCHINSON.
Clerk Supreme Court Wyoming Territory.

(Indorsement on cover:) No. 491. The Western Union Telegraph Company, plaintiff in error, vs. Magloire A. Mouseau. Wyoming Territory sup. court.

Filed 15th October, 1870.